Seminario sobre Competencia Economica
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Remarks of Federal Trade Commission Chairman
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Muchas gracias y buenas noches. Distinguished members of the judiciary; it is an honor to be here with you, and to be able to open this program together with my good friend and distinguished colleague, Eduardo Pérez Motta, and with two distinguished judges from either side of our border, Minister José Ramón Cassio Díaz of the Supreme Court of Justice of the Nation of Mexico and Judge Douglas Ginsberg of the United States Court of Appeals for the District of Columbia Circuit of the United States.

It is virtually inarguable that the free market, and the robust competition that supports it, is the most effective means by which to enhance consumer welfare. So it is that our respective Congresses have decided that the laws of supply and demand, not central planners or oligarchs, should decide how goods and services are allocated. Competition breeds innovation, creativity, and entrepreneurship at unmatched rates, stimulating efficiencies and resulting in lower prices, better products and services, innovation, and choice for consumers.

In a piece in the *Financial Times* last week, Martin Wolf comments on the recently-published book by William Lewis entitled, *The Power of Productivity: Wealth, Poverty and the Threat to Global Stability*. Lewis, says Wolf, posits that what distinguishes prosperous nations from poor nations is "remorseless, pervasive, fair and open competition." Wolf opines, though, that a "pervasive bias against competition" inhibits global productivity:

> Free and fair competition sounds simple to achieve. Nothing is further from the truth: competition upsets intellectuals who glory in the notion of state benevolence, bureaucrats who administer government programs, businesses that receive state favors and, in short, all those who gain, directly or indirectly, from distortions. Competition benefits often-despised outsiders against those who are well-connected and entrenched. It also requires the courts and government to work honestly. The surprise

> may rather be that some countries became rich than that so many are poor.[1]

That we support competition in a free market does not mean that we support a market in which participants are free of responsibility. Like competition on a playing field in any sport, we have rules in place to prevent cheating by those who fear the sometimes harsh realities of competition in which some may lose. When competition rules are violated, enforcers must act, and judges, ultimately, must adjudicate. Intervention when the rules are broken is necessary and appropriate; but converting a law enforcement intervention into an excuse to engage in market engineering is not.

The critical role of the judicial process in ensuring that competition enforcement is executed according to sound legal precedent and economic principles, rather than as a substitution of enforcers' judgments for those of markets, cannot be overstated. Competition enforcers in our two nations are not permitted to intervene in marketplace decisions, such as mergers or distribution schemes, without first sustaining the burden of presenting persuasive evidence that competition likely will be harmed. This is an important feature of our systems, because it disciplines our enforcement decisions, ensuring that they are based on marketplace facts, not on enforcers' or judges' predilections.

In the United States, the evolving relationship between the enforcers and the courts has produced not only a mutual respect for the important roles of each, but also an interactive process in which each makes the role and analysis of the other stronger. For example, during the 1960s and 1970s, the FTC tried to carry out its mandate through rigid structural rules, focusing

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[1] Martin Wolf, *Competition Would Overthrow the Tyranny of Vested Interests*, Fin. Times (Jan. 18, 2006), at 17.

on reducing the market positions of dominant firms and deconcentrating industries, basing enforcement policy on simple market concentration numbers and ignoring the fact that lower costs might explain the superior profitability of large firms. Such an approach nearly seems like ancient history, as the FTC's approach in that era was discredited and replaced with modern antitrust theory, steeped in facts and economics. Significantly, the change initially came not though internal reassessment at the FTC but through defeats suffered in the federal courts, as the courts reminded the agencies of the importance of applying the new antitrust thinking based on economic principles. During that time, academics, the courts and ultimately the enforcement agencies reached widespread agreement that the purpose of antitrust is to protect consumers; that economic analysis, both theoretical and empirical, should guide case selection; and that horizontal cases are the mainstays of enforcement.

Likewise, developments in the agencies' work and analysis has impacted how the courts analyze competition cases. U.S. courts today, for example, often look to the Department of Justice-FTC Horizontal Merger Guidelines for guidance on merger analysis. While not binding on the courts, of course (or the agencies, for that matter), the courts have recognized that the two competition agencies are experts in the framework for reviewing mergers. The courts also pay close attention to the agencies' assessment of the economic costs and benefits in cases of suspected anticompetitive conduct.

In the five years that I have been engaged in competition enforcement, I have learned that three realities make jobs of courts and enforcers particularly challenging. First, we cannot carry out our duty to protect competition through imposition of rigid structural rules and tests. Rather, we have learned from experience that sound competition analysis requires an understanding of market forces in each case. This requires a thorough review of the facts, viewed in light of sound economic principles that inform us about firms' incentives, to predict how markets will react in the future to economic conduct that is occurring now. This is tougher than our traditional roles, in which we are deciding whether present conduct complies with a clearly articulated legal standard.

This means that while structural market indicators, like market shares and concentration levels, provide a starting point, they do not provide the conclusion. We look to see – based on business documents and participants' testimony – how competition has actually worked in the relevant market, and we further our analysis with economic analyses of past behavior and models that help predict future behavior. While this is not an easy exercise, it better ensures that decisions to intervene in a market have an empirical basis and are, therefore, more likely to have benefits for the market.

Second, I have learned that while public and political support for free market principles today is on the rise, as Mr. Wolf said, support may waiver when individual interests are at stake. Competition is tough, and so there will always be those who, in their own self interest, seek to be relieved of the burdens of competition. This is particularly true of firms in industries that previously were regulated but now turn to antitrust for protection. Because market stakes are so high, many try to use political pressure to ensure a result that is good for them but perhaps not beneficial to competition and therefore consumers. The United States Department of Justice case against Microsoft is illustrative. Early in the case, it was reported that Microsoft, on the one hand, lobbied Congress to put an end to the case. Throughout the case, Microsoft's competitors, on the other hand, pressed the Department of Justice and, indeed, the courts, to remedy

Microsoft's anticompetitive conduct in ways that would benefit their individual interests. One lobbyist for a competitor went so far as to threaten me that if we did not impose the remedies requested, we would never receive any cooperation from the high-tech industry again.

Fortunately, the pressure failed and the Justice Department acted according to the merits of the case. The trial court rejected attempts by Microsoft's competitors to secure remedies that would benefit them individually as "market engineering." And the Court of Appeals, with Judge Ginsburg writing, upheld the trial court's decisions and stated: "There is a real difference, however, between redressing the harm done to competition by providing aid to a particular competitor and redressing the harm by restoring conditions in which the competitive process is revived and any number of competitors may flourish (or not) based upon the merits of their offerings."[2]

At bottom, it is important to remember that individual companies are responsible only to their shareholders. It is enforcers and judges who must act in the public interest to protect competition and its underlying principles, not the interests of individual competitors.

And, third and finally, I have learned that it is not easy to trust the market when we have the power to intervene. Put another way, it is easy to give in to the temptation to intervene in a market when we do not like the results that market forces are producing. The hard part is having the strength to let the market work on its own, enforcing the rules without regulating market outcomes. Last year, I read with interest the remarks of a European leader on the passage of a law that was intended to benefit consumers. "[L]et us favor competition. Not wild competition,

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[2] *Massachusetts v. Microsoft Corp.*, 373 F.3d 1199, 1231 (D.C. Cir. 2004).

which destabilizes whole fields and endangers economic sectors, but rather regulated competition, to give more purchasing and economic power to consumers."[3]

Well, competition is supposed to be a bit "wild" in the sense that not all will win or even survive. But the prospect of winning is what stimulates the competition in the first place, and if it is aggressive, consumers will benefit from the low prices and improved products and service that is produced. Years ago, an American jurist, Judge Learned Hand, summed it up this way: "The successful competitor, having been urged to compete, must not be turned upon when he wins."[4] Similarly, former Assistant Attorney General Thurman Arnold, nearly 70 years ago stated that "the economic philosophy behind the antitrust laws is a tough philosophy. [Those laws] recognize that someone may go bankrupt. They do not contemplate a game in which everyone who plays can win."[5]

Finally, any hope that we in competition agencies might hold that courts would give our judgment any deference must be tempered by recognition that such deference must be earned. When the U.S. Department of Justice first began enforcing our Sherman Antitrust Act in 1890, and when the FTC opened for business in 1915, we received no such deference, nor were we entitled to it. I believe that a competition agency may expect its decisions to be relied upon only when has developed a well-earned reputation for applying a competition law in a competent,

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[3] Allocution de Monsieur Jacques Chirac, President of France, Jan. 4, 2005, *available at* http://www.elysee.fr/magazine/actualite/sommaire.php?doc=/documents/discours/2005/05VXF.html.

[4] *US v. Aluminum Co. of America*, 148 F.2d 416, 430 (2d Cir. 1945).

[5] Quoted by Jack Brooks, Address at Symposium in Commemoration of the 60th Anniversary of the Establishment of the Antitrust Division (Jan.10, 1994), Washington, D.C. (transcript available on Westlaw at 1994 WL 13093148).

even-handed, and economically sensible way. This reputation does not develop overnight, and indeed it took us decades to get there in the United States.

At the CFC's 10^{th} anniversary celebration in Merida in 2003, my colleague, newly appointed Commissioner Bill Kovacic, said: "when you look around the competition agencies of the world and ask which of them has accomplished more in their first ten years of existence than the Comision Federal de Competencia – the answer would be 'none'." I could not agree more.

I thank you again for having me here today.